

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E714922

TROY HAMILTON,
EMPLOYEE

CLAIMANT

BELLA VISTA POA,
EMPLOYER

RESPONDENT

NORTH RIVER INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 2, 2004

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE CONRAD ODOM, Attorney at
Law, Fayetteville, Arkansas.

Respondents represented by HONORABLE CHRISTINE CRYER,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

This case comes on for review by the Full
Commission on appeal by respondents from an opinion filed
herein by an Administrative Law Judge on July 31, 2003.

The Administrative Law Judge entered the following
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation
Commission has jurisdiction of this
claim.
2. On October 12, 1997, the
relationship of employee-employer-

carrier existed between the parties.

3. On October 12, 1997, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$296.00 for total disability and \$222.00 for permanent partial disability.
4. On October 12, 1997, the claimant sustained a compensable injury to his back.
5. There is no dispute at the present time over the claimant's entitlement to the payment of expenses incurred for reasonably necessary medical services related to his compensable injury.
6. There is no dispute at the present time over the claimant's entitlement to temporary total disability benefits.
7. The claimant's healing period from the effects of his compensable injury ended on or about November 18, 1999.
8. The claimant has sustained a permanent partial disability of 38% to the body as a whole. This includes a permanent physical impairment of 13% to the body as a whole, and a permanent partial "functional" disability for loss of wage earning (sic) capacity in the amount of 25% to the body as a whole.
9. The respondents have controverted the claimant's entitlement to any permanent partial disability

benefits in excess of 13% to the body as a whole.

10. An appropriate fee for the claimant's attorney is the maximum statutory attorney's fee on all permanent partial disability benefits herein awarded which are in excess of 13% to the body as a whole.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the decision of the Administrative Law Judge is correct and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

We therefore affirm the July 31, 2003 opinion of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the

provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant was entitled to a 25% loss in wage earning capacity in addition to his 13% permanent impairment. Based upon my de novo review of the record, I find that the claimant has failed to prove by a preponderance of the evidence that he was entitled to any wage loss.

The claimant sustained an admittedly compensable injury to his back on October 12, 1997. The claimant

ultimately underwent a fusion at L4-5 on March 10, 1998. Because of complications with the hardware, a second surgery was performed in November of 1999 to remove the hardware. Dr. Luke Knox assigned the claimant a 13% permanent impairment rating on November 18, 1999. The respondents accepted this permanent partial impairment and paid benefits accordingly. Presently before the Commission is the claimant's request for wage loss disability benefits. In my opinion, a review of the evidence demonstrates that the claimant is not entitled to any wage loss disability benefits.

The Arkansas Workers' Compensation Law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. In order to be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that she sustained permanent physical impairment as a result of the compensable injury. Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998). If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. See, Minor v. Poinsett

Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). To be entitled to any wage-loss disability benefit in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that he or she sustained permanent physical impairment as a result of a compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. Emerson Electric v. Gaston, supra.

In determining wage loss disability, the Commission may take into consideration the workers' age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the workers' future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Glass v. Edens, 233 Ark. 786,

346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990). A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence. Ark. Code Ann. §11-9-522(b)(2) (Repl. 2002). The employer or its workers' compensation insurance carrier has the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his average weekly wage at the time of the accident. Ark. Code Ann. §11-9-522(c)(1). In considering factors that may affect an employee's future earning capacity, the Commission considers the claimant's

motivation to return to work, since a lack of interest or a negative attitude impedes the assessment of the claimant's loss of earning capacity. Emerson Electric v. Gaston, supra.

The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

Under the Arkansas Workers' Compensation Law that existed prior to the passage of Act 796, an injured worker could also be classified as permanently and totally disabled under the "odd lot" doctrine even though the injured worker was not altogether incapacitated from work. An injured worker was said to fall into the "odd lot" category where the obvious severity of his injury combined with other factors such that the services he could perform were so limited in quality, dependability, or quantity that a reasonably stable market did not exist for those services even though the claimant was not completely incapacitated from work. See, Lewis v. Camelot, 35 Ark. App. 212, 816 S.W.2d 632 (1991). However, Act 796 eliminated the "odd-lot" doctrine as a consideration in a claim for permanent

disability benefits under the Arkansas Workers' Compensation Commission. See, Ark. Code Ann. § 11-9-522(e) (Repl. 2002).

In addition, Ark. Code Ann. § 11-9-102(4)(F)(ii) (Repl. 2002) provides:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14) (Repl. 2002).

Further, "disability" is defined as an "incapacity because of compensable injury to earn, in the same or any

other employment, the wages which the employee was receiving at the time of the compensable injury." Ark. Code Ann. § 11-9-102(8) (Supp. 1999).

Considering the context in which the terms "permanent benefits" and "disability" are used in Ark. Code Ann. § 11-9-102(5)(F)(ii), the amendments of Act 796 clearly impose a requirement on a claimant seeking compensation for a permanent decrease in earning capacity to show that the compensable injury was the major cause of any decrease in earning capacity to obtain an award of permanent disability benefits.

The claimant is 53 years old and is a high school graduate. The claimant also has an associates degree in nursing and is a registered nurse. He also has an associates degree in firefighting and is a certified paramedic. At the time of his compensable injury, the claimant was employed as firefighter/paramedic for the respondent-employer. Prior to working for the respondent-employer, the claimant was a self-employed dairy farmer. He began working for the respondent-employer in September of 1991 and was earning approximately \$25,000 a year at the time he sustained his admittedly compensable injury on October 12, 1997.

In December of 2001, the claimant started working as a registered nurse at Northwest Health of Benton County on Fridays. The claimant worked an 8-hour shift every Friday and was paid \$17 an hour. The claimant also collects social security disability benefits as well as a pension in the amount of \$1,460.00 per month from the Arkansas Police and Fire Pension Program. The claimant receives social security disability benefits in the amount of \$605.00 per month. With the \$17.00 an hour he makes on an 8-hour shift every Friday, the claimant's current yearly income is approximately \$31,852.00. This is almost \$7,000.00 more per year than the claimant was earning at the time he was injured. This is an obvious disincentive for the claimant to return to work.

The claimant testified at the hearing that he was released to return to work by Dr. Knox in December of 1998. However, the claimant did not seek any other employment until December of 2001. The claimant contended that the only work available for him at the hospital was the Friday only job. However, he presented absolutely no evidence that he attempted to find any other work in any other location similar to his work at the hospital. It is understandable that the claimant has restrictions with respect with bending, lifting and stooping and would not be able to do

patient care. He is also on narcotic medication which would limit his activities. However, the claimant is obviously not too unlimited from the fact that he is able to make \$17.00 an hour working.

Simply put, I cannot find that the claimant is entitled to any wage loss disability benefits. The claimant has not sought any retraining nor is he sincerely motivated to return to work. The claimant has a high school diploma with associates degrees in Fire Protection and Nursing as well as a paramedic certification and is a registered nurse. Furthermore, he is making approximately \$7,000 more a year than he was then when he was injured. When I consider the totality of the evidence contained within the record, I find that the claimant is not entitled to any wage loss disability benefits. Therefore, for all the reasons set forth herein, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner